Supreme Court, U.S.
FILED

931917 MAY 31 1994

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHONG-CHING TONG,
Petitioner,

vs.

ASSURED THRIFT AND LOAN ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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Petitioner in Pro Se

36 pp

QUESTIONS PRESENTED

1. May a California appellate court summarily dismiss an appeal in one case based on a non-final ruling in another case that the appellant was a vexatious litigant?

2. May a California appellate court summarily dismiss an appeal while its own published opinion holding that the trial court erred in dismissing the plaintiff's complaint for lack of subject matter jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioner SHONG-CHING TONG prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Five, entered in the above-entitled case on December 28, 1993. Said judgment was affirmed by the California Supreme Court when it denied a Petition for Review, entered on March 2, 1994.

PARTIES TO THE PROCEEDINGS

The Parties to this proceeding are the parties shown in the caption of the case, SHONG-CHING TONG and ASSURED THRIFT AND LOAN ASSOCIATION.

OPINIONS BELOW

The California Court of Appeal, Second Appellat District, Division Five, effectively affirmed the decision of the

trial court by dismissing the Petitioner's appeal, in an unpublished opinion. (Appendix A).

The California Supreme Court denied a Petition for Review (Appendix B).

The trial court's original order dismissing a State court lawsuit on the ground that exclusive jurisdiction was vested in the U. S. District Court, Central District of California and that the State court was without jurisdiction (Appendix C).

JURISDICTION

The California Supreme Court denied the Petition for Review on March 2, 1994. The Petitioner invokes this certiorari jurisdiction under 28 U.S.C. Section 1257(3). Petitioner argued below that the trial court's decision would violate his rights under both the California and the

United States Constitutions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION, Amend. XIV, sec 1:

Amendment XIV, section 1 to the United States Constitution is set forth in Appendix F.

CALIFORNIA CODE OF CIVIL PROCEDURE, Sec. 391.7.

California Code of Civil Procedure Section 391.7 (a) (b) (c) are set forth in Appendix F.

STATEMENT OF THE CASE

Petitioner SHONG-CHING TONG (hereinafter, "TONG") filed his complaint in the underlying matter in the Superior Court of the State of California in and for the County of Los Angeles on or about March 1991, seeking recovery under claims he had against ASSURED THRIFT AND LOAN

ASSOCIATION (hereinafter, "ASSURED"). ASSURED answered the complaint; then, moved for judgment on the pleadings. Plaintiff was granted leave to amend his pleading; then, filed and served his first amended complaint.

On or about February 21, 1992, defaults were entered against ASSURED. And ASSURED had never moved to vacate defaults.

At a date unknown, ASSURED went into Receivership and the Federal Deposit Insurance Corporation (hereinafter, "FDIC") appeared in this lawsuit in the place and stead of ASSURED.

FDIC then brought a motion for dismissal of the State Court action, alleging Federal preemption. Over TONG's objections, the State Court granted the motion and dismissed the case. TONG

appealed the dismissal. The matter was pending before the California Court of Appeal, Second Appellate District, Division Five, when, in an independent case, TONG was declared to be a vexatious litigant. Because the trial court's ruling in the independent case was an interim order, TONG then filed a "Petition for Writ of Mandate, Prohibitation and/or Appropriate Relief" with the Court of Appeal, Second Appellate District. Upon notification of TONG's Petition for Writ of Mandate (Appendix D), the Court of Appeal, Second Appellate District, Division Five, dismissed the pending appeal in this matter, even though the Court of Appeal, Second Appellate District, Division Five, was drafting its opinion holding that Federal and State courts have concurrent jurisdiction

over suit filed prior to bank's insolvency and receivership. TONG thereupon sought relief from the California Supreme Court. TONG's Petition for Review was denied.

On March 9, 1994, the Court of Appeal, Second Appellate District, Division Five, issued a published opinion, held that "State Court has concurrent jurisdiction over suit filed against bank before its insolvency and receivership" (Appendix E).

Because the opinions issued by the Court of Appeal, Second Appellate District, Division Five, are contradiceted itself in this case and in case no. B070925. TONG now seeks relief from the United States Supreme Court.

GROUND FOR INVOKING THE JURISDICTION OF THIS COURT

(i) Date of entry of the judgment or decree sought to be reviewed:

December 9, 1993

(ii) Date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari:

None.

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a writ of certiorari in connection with which the cross-petition is filed:

Not applicable.

(iv) The statutiry provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari:

Title 28 United States Code, Section 1257.

THE CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV, Section 1.

California Code of Civil Procedure, Section 391.7.

REVIEW OF JUDGMENT OF A STATE COURT

Please see above and Appendix A.

REVIEW OF A JUDGMENT OF A UNITED STATES COURT OF APPEALS

Not applicable.

REASONS FOR ISSUING THE WRIT.

Petitioner TONG, in an unrelated case, was erroneously declared, by the trial court, to be a "vexatious litigant" under California Code of Civil Procedure Section 391 et seq. The California Court of Appeal, Second Appellate District, Division Five, without waitng for the vexatious litigant ruling to become final, on its own motion, took judicial notice (Appendix D) of the ruling, which was not final and which in TONG's opinion was erroneous, and used such judicial notice as the basis for dismissing TONG's appeal in this case.

California Code of Civil Procedure section 391.7 (a) provides in pertinent part that:

> " . . ., the court may enter a prefiling order prohibits a vexatious litigant from filing any new litigation . . . ."

In the instant case, the Court of Appeal, Second Appellate District, Division Five, had misinterpreted the statute and considered TONG's appeal as a new litigation.

In addition, the Court of Appeal, Second Appellate District, Division Five, had failed to cite any statute or cases supporting its interpretation that "an appeal is a new litigation."

In Robbins, et al. v. Foothill Nissan, et al. (1994) 93 Daily Journal D.A.R. 3029 (Appendix E), the Court of Appeal, Second Appellate District, Division Five ("The Appellate Court")

held that:

> "Federal and State courts have concurrent jurisdiction over suits filed prior to the appointment of the FDIC as the receiver against a banking or other savings institution . . . ."

The Appellate Court further held that:

a) "Concurrent jurisdiction has been a common phenomenon in our judicial history and exclusive federal court jurisdiction over cases arising under federal laws has been the exception rather than the rule" (Citation)

b) "The presumption is that jurisdiction is concurrent, and some strong showing of need for exclusive jurisdiction is required to overcome that presumption." (Citation.) (Cianci v. Superior Court (1985) 40 Cal.3d 903)

c) "The filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver." (Italics added)

d) "It is the general rule that jurisdiction is determined at

> the time the action is filed and cannot be divested by subsequent actions or events." (Citations) (Generally, subject matter jurisdiction attached at time action is filed cannot be divested.)

A fundamental right of the United States citizenship is the right to seek resolution of disputes in the court system. By determining that TONG is a vexatious litigant when he does not qualify as such under California law has unjustly placed a restraint on TONG's free and unimpeded access to the courts, has imposed an unwarranted hardship on him, and has violated his right to due process of law. Especially, when the Court of Appeal, Second Appellate District, Division Five, knew that the trial court was erred in dismissing of plaintiff's complaint and that TONG's appeal has merit.

CONCLUSION

For the reasons set forth above, Petitioner SHONG-CHING TONG prays that the Court will issue its Petition for Certiorari to the California Court of Appeal, Second Appellate District, Division Five, to review its December 9, 1993's opinion dismissing TONG's appeal.

May 23, 1994

Respectfully submitted,

Shong-Ching Tong,
Petitioner in Pro Se.

APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHONG-CHING TONG

Plaintiff and Appellant,

v.

ASSURED THRIFT AND LOAN ASSOCIATION,

Defendant and Respondent.

No. B077109

(Super.Ct.No. KC004452)

COURT OF APPEAL-SECOND FILED
December 28, 1993
Joseph A. Lane, Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Dismissed.

Shong-Ching Tong, in pro per., for Plaintiff and Appellant.

Zoran J. Segina, for defendant and Respondent.

Plaintiff, Shong-Ching Tong, has previously been determined to be a vexatious litigant within the meaning of Code of Civil Procedure[1/] section 391 et seq. We have judicially noticed the contents of the record in Tong v. Isuzu Motors of America, Inc. (Nov. 23, 1993) B080053, where plaintiff was found to be a vexatious litigant by the Honorable John A. Torribio.

Defendant filed the notice of appeal in this case on June 25, 1993. On November 24, 1993, this court, pursuant to section 391.7, subdivision (c), issued an order staying the present appeal and directing plaintiff to explain why the present appeal has merit.

We have carefully reviewed the brief and conclusory explanation as to why the present litigation purportedly

has merit filed by plaintiff. we are persuaded plaintiff has failed to demonstrated the present appeal has merit. In fact, in paragraph seven of his declaration, plaintiff admits the present case should be in federal court rather than before this court. Further, the only intelligent conclusion that can be drawn from the papers before us, including the record in Tong v. Isuzu Motors of America, Inc., supra, is the present appeal has been filed "for the purposes of harassment . . . ." (Section 391.7, subd. (b).) Accordingly, pursuant section 391.7, subdivision (c), the present appeal is dismissed. (Andrisani v. Hoodack (1992) 9 Cal.App.4th 279, 281; In re Whitaker (1992) 6 Cal.App.4th 54, 55-57).

The appeal of plaintiff, Shong-

1/ All future statutory references are to the Code of Civil Procedure.

Ching Tong, is dismissed. Defendants shall each separately recover their costs on appeal from plaintiff Shong-Ching Tong.

NOT TO BE PUBLISHED

TURNER, P.J.

I Concur:

GODOY PEREZ, J.

APPENDIX B

Second Appellate District, Division Five
No. B077109
S037659

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

==========

SHONG-CHING TONG, Appellant

v.

ASSURED THRIFT & LOAN ASSOCIATION,
Respondent

==========

Appellant's petition for review DENIED.

SUPREME COURT
FILED
March 2, 1994

Robert Wandruff
H. Cruz
_____
DEPUTY

Lucas
_____
Chief Justice

APPENDIX C

FEDERAL DEPOSIT INSURANCE CORPOARTION
LEGAL DIVISION
ZORAN J. SEGINA, ESQ. (#129676)
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Attorneys for Defendant, FEDERAL DEPOSIT INSURANCE CORPORATION as Liquidator for ASSURED THRIFT & LOAN ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHONG-CHING TONG,

Plaintiff,

v.

ASSURED THRIFT & LOAN ASSOCIATION, etc., et al.,

Defendants.

CASE NO. KC004452

ORDER OF DISMISSAL

The motion by the FEDERAL DEPOSIT INSURANCE CORPORATION as Liquidator for Assured Thrift & Loan Association ("FDIC"), to dismiss plaintiff's complaint as against FDIC for lack of subject matter jurisdiction, came on regularly for

hearing before this court on April 28, 1993.

The Court, having reviewed the moving papers, opposition to the motion, reply, and oral argument of the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff's Complaint as against FDIC, is hereby dismissed for lack of subject matter jurisdiction.

DATED: May 10, 1993

/S/ ROBERT A. DUKES

Honorable Robert A. Dukes
Judge of the Superior Court

APPENDIX D

BANKING

State Court Has Concurrent Jurisdiction Over Suit Filed Against Bank Before Its Insolvency and Receivership

Cite as 93 Daily Journal D.A.R. 3029

NELSON L. ROBBINS et al.,
Plaintiffs-Appellants,

v.

FOOTHILL NISSAN et al.,
Defendants-Respondents.

No. B070925
(Super.Ct.No. NWC56199)
California Court of Appeal
Second Appellate District
Division Five
Filed March 4, 1994

CERTIFIED FOR PARTIAL PUBLICATION*

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III(D).

APPEAL from an order of the Superior Court of Los Angeles County, John H. Major, Judge. Reversed.

Nelson L. Robbins, Sharon E. Robbins, in pro per., for plaintiff and

Appellants.

Ann S. DuRoss, Robert D. McGillicuddy, Gregory E. Gore; Jean J. Wilcox; Ford, Walker, Haggerty & Behar, Maxine J. Lebowitz, for defendants and Respondents.

I. INTRODICTION

Plaintiffs, Nelson L. Robbins and Sharon E. Robbins, appeal from an order dismissing their complaint against defendants, Foothill Nissan and the Federal Deposit Insurance Corporation ("FDIC"), as receiver for Far Western Bank ("Far Western") and Atlantic Finance Bank ("Atlantic"), a division of Far Western, for lack of subject matter jurisdiction. In the published portion of this opinion, we determine that federal and state courts have concurrent jurisdiction over suits which are filed prior to the appointment of the FDIC as the receiver against a banking or other savings institution which is subject to a receivership pursuant to 12 United States Code section 1821. . . .

IV. DISPOSITION

The order dismissing the action for lack of subject matter jurisdiction is reversed . . . .

TURNER, P.J.

We Concur: GRIGNON, J; ARMSTRONG, J.

APPENDIX E

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHONG-CHING TONG — No. B077109

Plaintiff and Appellant,

v.

ASSURED THRIFT AND LOAN ASSOCIATION,

Defendant and Respondent.

(Super.Ct.No. KC004452)

COURT OF APPEAL-SECOND
FILED
November 24, 1993
Joseph A. Lane, Clerk

ORDERS DIRECTING PLAINTIFF TO SHOW THE PRESENT LITIGATION HAS MERIT AND STAY OF ALL PROCEEDINGS

It has come to the attention of this court that plaintiff, Shong-Ching Tong, has been found to be a vexatious litigant within the meaning of Code of Civil Procedure[1/] section 391 et seq.

1/ All future statutory references are to the Code of Civil Procedure.

Further, it has come to the attention of this court that plaintiff is subject to a prefiling order pursuant to section 391.7, subdivision (a). This court has judicially noticed the Court of Appeal file in the case of Tong v. Superior Court, case no. B080053. Pursuant to section 391.7, subdivision (c), all proceedings are stayed. Plaintiff shall have 10 days within which to secure permission to continue with the present litigation pursuant to section 391.7, subdivision (b). (Andrisani v. Hoodack (1992) 9 Cal.App.4th 279, 280-281).

/S/

PAUL TURNER, P.J.

I Concur:

GODOY PEREZ, J.

APPENDIX F

U. S. CONSTITUTION, Amend. XIV, sec 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of certizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

California Code of Civil Procedure,
Section 391.7.

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of such an order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation

upon the finishing of security for the benefit of the defendants as provided in section 391.3.

(c) The clerk shall not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without such an order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of such a notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of such notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of any such order.

(2)

FILED
AUG 8 1994
OFFICE OF THE CLERK

No. 93-1917

In the Supreme Court of the United States

OCTOBER TERM, 1994

SHONG-CHING TONG, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR ASSURED THRIFT AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether the California Court of Appeal, having previously identified petitioner as a vexatious litigant, correctly dismissed his appeal.

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Robbins v. *Foothill Nissan*, 28 Cal. Rptr. 2d 190 (Ct. App. 1994) 6

Constitution and statutes:

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Financial Institution Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1441a *et seq.*:

12 U.S.C. 1821(d)(3) (Supp. IV 1992) 2

12 U.S.C. 1821(d)(6) (Supp. IV 1992) 6

12 U.S.C. 1821(d)(13) (Supp. IV 1992) 6

Cal. Civ. Proc. Code (West 1990):

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1917

SHONG-CHING TONG, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR ASSURED THRIFT AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the California Court of Appeal (Pet. App. A1-A4) is unpublished. The Order of Dismissal from the Los Angeles County Superior Court (Pet. App. C1-C2) is unreported. The order of the California Supreme Court denying petitioner's petition for review (Pet. App. B1) is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on December 28, 1993. The California Supreme Court denied petitioner's petition for review on March 2, 1994. The petition for a writ of certiorari was filed on

May 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

1. On March 27, 1991, petitioner filed an action titled *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, Case No. KC 004452, in Los Angeles County Superior Court. On the same date, petitioner filed a virtually identical action in the same court titled *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, Case No. KC 004451.

2. On January 3, 1992, the Federal Deposit Insurance Corporation (FDIC) was appointed liquidator of Assured Thrift & Loan Association (Assured). On February 13, 1992, the FDIC notified petitioner that the FDIC was liquidator for Assured and that, before proceeding with either action, petitioner must first exhaust his administrative remedies under the claims process established by the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(d)(3) (Supp. IV 1992), by submitting a written Proof of Claim to the FDIC by April 22, 1992. Petitioner filed a Proof of Claim with the FDIC on approximately March 3, 1992.

At the time petitioner submitted the Proof of Claim, petitioner requested that the Los Angeles County Superior Court enter a default against the FDIC, as successor to Assured in both actions. The court did not do so, but granted a motion by the FDIC to stay the actions for 180 days from April 22, 1992. Following expiration of the stay, on March 4, 1993, the FDIC moved to dismiss both of petitioner's actions for lack of subject matter jurisdiction, arguing that under FIRREA petitioner could obtain review of an administrative claim denied by the FDIC only in an appropriate United States

District Court. On May 10, 1993, the Superior Court granted the FDIC's motion. Pet. App. C1.

3. On or about June 4, 1993, the FDIC denied petitioner's claim, and informed petitioner of the denial.

Petitioner then appealed the dismissal of this state-court action to the California Court of Appeal. Petitioner also appealed the dismissal of his second state-court action to the California Court of Appeal. *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, No. B 077108 (June 10, 1994).[1]

On August 2, 1993, petitioner filed a complaint for damages in the United States District Court for the Central District of California (Case No. 93-4571 JMI(JRX)). That complaint made the same allegations against Assured and the FDIC as had petitioner's two previous state-court complaints.

On November 24, 1993, the court of appeal in this case judicially noticed the contents of the record in *Tong* v. *Superior Court*, where petitioner was recognized as a vexatious litigant pursuant to Cal. Civ. Proc. Code § 391.7 (West 1990). Pet. App. E1-E2.[2] The court of appeal

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[1] The California Court of Appeal recently reversed the dismissal in this second case on the ground that it had concurrent jurisdiction, but suggested that the claim be removed to federal district court and consolidated with the claim in the federal judicial forum. See *Shong-Ching Tong* v. *Assured Thrift & Loan Assoc.*, No. B 077108 (June 10, 1994).

[2] A "vexatious litigant" is defined as a person who: (1) has commenced at least five litigations within a seven-year period which have been either determined adversely or not prosecuted; (2) repeatedly relitigates finally determined issues; (3) repeatedly uses tactics that are frivolous or intended to cause unnecessary delay; or (4) has been declared a vexatious litigant by a state or federal court of record based upon the same events that the litigant seeks to relitigate. Cal. Civ. Proc. Code § 391.0(b) (West 1990).

sua sponte issued an order staying the appeal and directing petitioner to explain why his appeal had merit. The court, after reviewing petitioner's response to its order, noted that petitioner "admits the present case should be in federal court rather than before this court." *Id.* at A3. The court therefore concluded that the appeal was meritless and had been brought for purposes of harassment. *Ibid.* Consequently, on December 28, 1993, the court dismissed the appeal. *Id.* at E1. The court of appeal subsequently denied petitioner's motion for reconsideration.

Petitioner sought review of the dismissal of his appeal in the California Supreme Court. His petition for review was denied on March 2, 1994. Pet. App. B1.

ARGUMENT

1. Petitioner appears to be challenging the California Court of Appeal's dismissal of his appeal as a violation of the Due Process Clause. That court's application of a state rule of procedure requiring that vexatious litigants receive permission from the presiding judge before continuing litigation raises no substantial due process issue. The Due Process Clause does not bar California from adopting rules intended to protect its courts from abuse by willful litigants. In any event, the California Court of Appeal did not dismiss petitioner's claim solely on procedural grounds, but held that petitioner had failed to demonstrate that his appeal had any merit. That substantive basis for dismissal raises no conceivable due process concerns.

2. Petitioner also claims (Pet. 8-11) that the California Court of Appeal erroneously found him to be a vexatious litigant. That contention solely raises issues of state law and is, in all events, without merit.

The court of appeal took judicial notice that petitioner had been determined to be a vexatious litigant in another matter. See *In re Finding of John Luckett as a Vexatious Litigant*, 283 Cal. Rptr. 312 (1991) (holding that court may take judicial notice of documents filed with the court, even in other cases, to determine whether a party is a vexatious litigant), review denied (Sept. 25, 1991). Because petitioner had previously been found to be a vexatious litigant, he was subject to Cal. Civ. Proc. Code § 391.7(c) (West 1990), which requires a vexatious litigant to receive court permission before filing *any* litigation.[3] That rule provides:

> The clerk shall not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. * * * The litigation shall be automatically dismissed unless the plaintiff * * * obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b).

Cal. Civ. Proc. Code § 391.7(c) (West 1990). Petitioner did not seek the required permission before filing his appeal, and the court of appeals subsequently denied permission because petitioner failed to show that his appeal had any merit.

3. Petitioner contends (Pet. 9-10) that the court of appeal erroneously concluded that the state courts do not have concurrent jurisdiction with the appropriate United States district court to hear cases concerning

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[3] "Litigation" is defined by Cal. Civ. Proc. Code § 391.0(a) (West 1990), which states that litigation "means any civil action or proceeding, commenced, maintained or pending in any state or federal court of record." Petitioner's appeals to the California Court of Appeal qualify as litigation under this provision.

claims against the FDIC. He claims that the decision below conflicts with another case from the court of appeal, *Robbins* v. *Foothill Nissan*, 28 Cal. Rptr. 2d 190 (1994), which was decided after petitioner's case was dismissed.

In *Robbins*, consumers brought an action in state court against automobile dealerships and banks, alleging a variety of improprieties associated with financing agreements related to the purchase of automobiles. Subsequently, the FDIC became receiver of one of the banks that was a party to the state-court action. The Superior Court granted the FDIC's motion to dismiss on the grounds that federal courts had exclusive jurisdiction over the action.

On appeal, the FDIC argued that, pursuant to 12 U.S.C. 1821(d)(6) and (13) (Supp. IV 1992), only federal district courts possessed subject matter jurisdiction over claims against insolvent banks denied by the FDIC, even where the claim was filed in state court prior to the bank's insolvency. The California Court of Appeal disagreed, holding that in claims against banks originating in state court prior to a bank's insolvency, which claims subsequently are administratively denied by the FDIC under FIRREA, state courts and federal courts have concurrent jurisdiction and claimant may obtain review in either forum. 28 Cal. Rptr. 2d at 197-198.

Here, unlike the situation in *Robbins*, petitioner chose to seek review in federal district court of FDIC's denial of his claims. In this case, by saying that the issue should go forward in petitioner's federal-court action, the California Court of Appeal has done no more than honor petitioner's choice of forum, and by holding him to that choice, is avoiding duplicative, potentially conflicting disposition of identical claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DOUGLAS H. JONES
Acting General Counsel

ANN S. DUROSS
Assistant General Counsel

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Federal Deposit Insurance Corporation

AUGUST 1994

(3)

Supreme Court, U.S.
FILED
SEP 12 1994
OFFICE OF THE CLERK

No. 93-1917

In The

Supreme Court of the United States

October Term, 1993

SHONG-CHING TONG,
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR ASSURED THRIFT AND
LOAN ASSOCIATION,
Respondent

On Petition For A Writ Of Certiorari

To The California Court Of Appeal

Second Appellate District,

Division Five

PETITIONER'S REPLY BRIEF

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Petitioner Pro Se

11pp

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Respondent

On Petition For A Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District,
Division Five

PETITIONER'S REPLY BRIEF

In Respondent's Brief, there are several statements which are not true as stated. Copies of documents sent to the Respondent and the Clerk's Office of this Court (Appendix I) will prove petitioner's assertions:

1. On March 27, 1991, petitioner filed two complaints in the Los Angeles Superior Court. One complaint was for damages for: 1) Fraud and conspiracy; 2) Embezzlement, Grand Theft, and Receiving Stolen Properties; 3) Conversion; and 4) Intentional Interference with Economic Prospective Advantage against Assured Thrift and Loan Association, Edward L. Billings, Chung Hsi Yeh, Tzu Lin Yeh, and ALDA Properties, Case No. KC004451. The other complaint was for damages for: 1) Malicious Prosecution; 2) Abuse of Process; 3) Intentional Infliction of Emotional Distress against Assured Thrift and Loan, Edward L. Billings, and Elliott Gayer, Case No. KC 004452 (Respondent's Brief, P. 2, Para 1 is not true).

2. On March 9, 1994, in Nelson L. Robbins, et al. v. Foothill Nissan, et al. (1994) 93 Daily Journal D.A.R. 3029 (Appendix

E), the California Court of Appeal, Second Appellate Dictrict, Division 5, held that:

> "Quite obviously, any case where suit has been filed before the FDIC is appointed as the Receiver, such as the present case, the toiling of the statute of limitation is irrelevant." at P. 3031

The Court further held that:

> "The filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the Receiver." at P. 3031

(Respondent's Brief, P. 2, Para 2 is not true).

3. On June 10, 1994, the California Court of Appeal, Second Appellate District, Division 2, based on the aforesaid published opinion in Robbins v. Foothill Nissan, Supra (Appendix E), reversed the Los Angeles Superior Court's Order of Dismissal of case no. KC004451 (Appendices G, H) (Respondent's

Brief, P. 3, Para 3 is not true).

4. In Robbins v. Foothill Nissan, Supra, and in case No. KC004451, Respondent did not file any "Petition for Rehearing" with the California Court of Appeal and did not file any "Petition for Review" with the California Supreme Court. If Respondent thinks its arguments are rational and have merit, and the California Court of Appeal Division 5 erred in Robbins v. Foothill Nissan and Division 2 erred in case no. KC004451, then, the failures of Respondent to take any action can clearly show Respondent's arguments in the instant case has no merit at all. Respondent has distorted, misrepresented, and misstated facts and legal authorities, as depicted in Appendices C, E, G, H, and I, in the instant case and in Robbins v. Foothill Nissan. **Therefore;**

1. The Court should grant the Petition, because an Appeal is not a new litigation (Black's Law Dictionary, 6th Ed.).

2. The Court should grant the petition, because California Code of Civil Procedure, Section 391.7 does not say to dismiss a valid litigation just because a party has been declared as a Vexatious Litigant (Muller v. Tonner (1969) 82 Cal.Rptr. 738, 2 CA3d 445).

3. The Court should grant the Petition, because the California Court of Appeal, Second Appellate District, Division 5, was in violation of Due Process of Law declaring petitioner as a Vexatious Litigant when petitioner filed a "Petition for Writ of Mandate" for a review of a non-appealable, non-final ruling in case no. VC 006762 (B080053) made by the Los Angeles Superior Court of the State of California, Norwalk Branch, entitled TONG v. ISUZU, et al.

4. The Court should grant the Petition, because the dismissal of petitioner's appeal in the instant case by the California Court of Appeal, Second Appellate District, Division 5 was erroneous and arbitrary. The reversal in case no. KC004451 (B077108) by Division 2 of California Court of Appeal, Second Appellate District proved the Division 5 of California Court of Appeal, Second Appellate District, erred in dismissing petitioner's appeal and some safeguards are needed so that no one could and should abuse the judicial power in the future.

CONCLUSION

For the foregoing reasons and in the best interest of justice and the integrity of the judicial system, the Petition for a Writ of Certiorari should be granted.

DATED: September 9, 1994

Shong-Ching Tong,
Petitioner Pro Se

APPENDIX G

FEDERAL DEPOSIT INSURANCE CORPORATION
LEGAL DIVISION
ZORAN J. SEGINA, ESQ. (#129676)
4 Park Plaza, Irwine, CA 92714
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Attorneys for Defendant, FEDERAL DEPOSIT INSURANCE CORPORATION As Liquidator for ASSURED THRIFT & LOAN ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

SHONG-CHING TONG, CASE NO. KC004451

Plaintiff, ORDER OF DISMISSAL

v.

ASSURED THRIFT & LOAN ASSOCIATION, etc., et al.,

Defendants.

The motion by the FEDERAL DEPOSIT INSURANCE CORPORATION as Liquidator for Assured Thrift & Loan Association ("FDIC"), to dismiss plaintiff's complaint as against FDIC for lack of subject matter jurisdiction, came on regularly for

hearing before this court on April 28, 1993.

The Court, having reviewed the moving papers, opposition to the motion, reply, and oral argument of the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff's Complaint as against FDIC, is hereby dismissed for lack of subject matter jurisdiction.

DATED: May 10, 1993

/S/ ROBERT A. DUKES

Honorable Robert A. Dukes
Judge of the Superior Court

APPENDIX H

NOT FOR PUBLICATION

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHONG-CHING TONG

Plaintiff and Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver, etc.,

Defendant and Respondent.

No. B077108

(Super.Ct.No. KC 004451)

COURT OF APPEAL-SECOND DIST.

FILED

JUN 10, 1994

JOSEPH A. LANE, Clerk

Plaintiff appeals from an order dismissing his action against the Federal Deposit Insurance Corporation (FDIC), receiver for Assured Thrift and Loan Association (Assured), for lack of subject matter jurisdiction. We reverse the dismissal, but suggest, as plaintiff himself has urged, that this case

more suitably belongs in federal court, where another action has been commenced between the parties concerning the same subject matter.

FACTS . . . .

DISCUSSION . . . .

The jurisdictional issue presented is whether section 1821(d) ousts the jurisdiction of a state court over a suit against a financial institution subject to FDIC receiver-ship, which was commenced before the receiver-ship. . . .

In Robbins v. Foothill Nissan (1994) 22 Cal.App.4th 1769, Division 5 of this court recently performed an extended analysis of the statute, with respect to the same jurisdiction-al issue, and concluded that it did not deprive a superior court of jurisdiction acquired before commencement of an FDIC receivership. Upon independent consideration, we agree with the analysis and conclusion in

Robbins. . . .

The court therefore should not have dismissed this case for lack of jurisdiction. However. . . .

DISPOSITION

The order of dismissal is reversed. Plaintiff shall recover costs.

NOT FOR PUBLICATION

/S/
FUKUTO, J.

We concur:

/S/
BOREN, P. J.

/S/
GATES, J.

APPENDIX I

Shong-Ching Tong
1741 Phillips Dr.
Pomona, CA 91766

July 12, 1994

The Honorable Drew S. Days, III
Solicitor General
U. S. Department of Justice
Washington D. C. 20530

Re: Shong-Ching Tong v. FDIC
S. Ct. No. 93-1917

Dear Mr. Days:

Enclosed please find copies of documents in relation to my Petition for Writ of Certiorari.

I hope these documents would help you or your office in the preparation of the Government Response.

The following documents are enclosed for your reference:

1. Order of Dismissal, Case No. KC 004451, Los Angeles Superior Court, filed by FDIC on May 10, 1993.

2. Order of Dismissal, Case No. KC 004452, Los Angeles Superior Court, filed by FDIC on May 10, 1993.

3. Order: The Petition for Writ of Mandate Prohibition is denied. Case No. B080053, CA Court of Appeal, Second Appellate District, Division 5.

4. Orders directing plaintiff to show the present litigation has merit and stay of all proceeding. Case No. B077109, CA Court of Appeal, Second Appellate District, Division 5.

5. Declaration of Shong-Ching Tong in response to Court's Order to show the present litigation has merit and appellant's request that the Court stay the Order of November 24, 1993.

6. Slip Opinion. Case No. B077109, CA Court of Appeal, Second Appellate District, Division 5.

7. Motion for Reconsideration, Case No. B077109.

8. Order: Appellant's Motion for reconsideration is denied. Case No. B077109, CA Court of Appeal, Second Appellate District, Division 5.

9. Daily Appellate Report, case No. B070925, March 4, 1994, CA Court of Appeal, Second Appellate District, Division 5.

10. Slip Opinion, Case No. B077108, CA Court of Appeal, Second Appellate District, Division 2. The Appellat court reversed the trial court's dismissal.

As you can see from Attachment 3, the case no. B080053, has not been finally decided, because it's not an appeal.

As you can see from Attachments 4, 9

and 10, Division 5 of CA Court of Appeal, Second Appellate District had abused its judicial power.

If you would compare Attachments 5 and 7 with Attachment 6, you would be able to find out that Division 5 of CA Court of Appeal, Second Appellate District, has misstated facts in its Slip Opinion in Case No. B077109.

Please feel free to contact me if your office need any further information on this matter.

Very truly yours,

/S/

Shong-Ching Tong

CC: Honorable William K. Suter
Office of the Clerk
U. S. Supreme Court
Washington D. C. 20543